IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE, FENFLURAMINE, DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. _____

BECHTLE, J. March , 2001

Presently before the court is plaintiffs Sheila Brown, et al.'s ("Plaintiffs") and defendant American Home Products Corporation's ("AHP") joint motion to require the AHP Settlement Trust to distribute the proceeds of Settlement without regard to the assertion of claims by the United States; the United States' (the "Government") Statement of Interest in response thereto; and the exhibits and testimony received by the court at an evidentiary hearing on said motion held on March 13, 2001. For the reasons set forth below, the motion will be granted in part and denied in part.

I. BACKGROUND

On November 18, 1999, defendant AHP and class counsel, on

behalf of the class of persons who ingested the diet drugs Pondimin and Redux, reached an agreement of settlement (the "Settlement Agreement"). The Court granted preliminary approval of the class action Settlement Agreement on November 23, 1999. (Pretrial Order No. 997.) The court granted final approval of the Settlement Agreement on August 28, 2000. See Pretrial Order No. 1415 (discussing, inter alia, background of instant litigation, scope of class and terms and benefits of Settlement Agreement in thorough detail). That Order is currently before the United States Court of Appeals for the Third Circuit.

The Settlement Agreement requires AHP to create a fund to provide benefits to the class. AHP created the fund out of its general assets and borrowings, rather than from the proceeds of a liability insurance policy.[1] (Tr. 3/13/01 Ex. AHP-3.) That fund must be administered by a trust consisting of seven court appointed trustees (the "Trust"). (Settlement Agreement §§ VI.A & VI.C.) Among the benefits to be distributed by the Trust are payments to qualified class members pursuant to a benefits

[1] Although AHP carried $400,000,000.00 in product liability insurance, it did not make a claim against that policy for payments to the Trust. See Tr. 3/13/01 Ex. AHP-3 (reflecting testimony by William J. Ruane, AHP's Associate General Counsel for Litigation). AHP expects that future payments to the Trust will also be made from general assets or proceeds of borrowing. Id. Ex. AHP-3.

matrix.[2] Id. § IV.B. These "matrix compensation benefits" are to be distributed out of the Trust's Fund B to class members who have suffered significant damage to their heart valves, possibly due to their ingestion of diet drugs. Id.

As part of the process designed to provide efficient resolution of the diet drug litigation, the Settlement Agreement establishes detailed procedures governing the processing of class members' claims, including adjudication of claims by attorneys and subrogees to Settlement proceeds otherwise owed to class members. Id. § VI.C.4. In order to avoid the lengthy payment delays experienced in a number of other mass tort class action settlements and foster efficient administration of the Trust, the Settlement Agreement establishes strict deadlines for completion of these claims administration procedures. (Settlement Agreement § VI.C.4.) This process provides subrogees with a very important benefit - the ability to recover from the Trust any valid and enforceable subrogation claims that they have against AHP without having to prove that AHP is actually liable on the merits of those claims. The Settlement Agreement does not provide a

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[2] There are four matrices under the Settlement. The matrices are composed of cells formed by the intersection of five separate matrix levels of severity of valvular heart disease ("VHD") and 11 separate age intervals. Generally, the amount of compensation provided by the matrices decreases with age. The levels of VHD described on the Settlement matrices correspond with the medical consensus regarding the stages of serious VHD. (Pretrial Order No. 1415 at 49-50.)

mechanism for adjudication of claims made by the Government besides the general provisions concerning adjudication of subrogation claims.

Under the Settlement Agreement, third-party payers can recover from the Trust if four conditions are met. First, the claim must be asserted prior to distribution of Fund B benefits to which the claim relates. Id. § VII.D.2. Second, the claim must be based on a positive provision of law or a valid enforceable contract. Id. Third, the third-party asserting the subrogation claim must clearly establish that it actually made payments to or for the benefit of the class member "which is of a type that the putative subrogee would be entitled to recover against AHP." Id. Lastly, the third-party is only entitled to Fund B proceeds to the extent of the actual payment made. Id.

In entering the Settlement Agreement, AHP did not admit or concede any liability, and the agreement expressly states that it shall not be construed as an admission or concession of liability. Id. § VII.F.4. Furthermore, the Settlement Agreement explicitly provides that to the extent any person has rights of subrogation as a result of payments made for the benefit of a class member, such rights may be asserted against the Trust's obligation to make payments to that class member from Fund B, but that such claims shall not be asserted against AHP except to the extent required by applicable state or federal law. Id. §

VII.D.1.

The Settlement Agreement also mandates that information concerning individual class members received by the parties and the Trust be kept confidential. Id. § VIII.F.1. It does not explicitly authorize disclosure of this information to government agencies.

In a letter dated July 27, 2000, the United States Department of Justice ("DOJ"), on behalf of the United States Departments of Health and Human Services ("HHS"), Defense ("DOD"),[3] Veterans Affairs ("VA") and the Indian Health Service ("IHS"), asserted that these client agencies were entitled to reimbursement from the proceeds of the Settlement for payments made to individual class members for medical treatment allegedly necessitated by the use of diet drugs.[4] (Mem. of Law in Supp. of Pls.' Mot. to Require the AHP Settlement Trust to Distribute the Proceeds of Settlement Without Regard to the Assertion of Claims by the United States ("Pls.' Mem. in Supp. of Mot.") Ex. A.) According to the Government, these agencies are entitled to the proceeds under the provisions of the Medical Care Recovery Act, 42 U.S.C. § 2651 ("MCRA"), and/or the Medicare Secondary Payer

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[3] As used herein, the DOD includes the Army, Navy and Air Force.

[4] HHS administers the Medicare program. (Pls.' Mem. in Supp. of Mot. Ex. A.) The other agencies provide health services to current and former government employees and their families through various federal programs. Id.

Act, 42 U.S.C. § 1395y(b) ("MSP"). See id. Ex. A & United States' Statement of Interest at 2-4 (asserting source of government's claim).

According to the parties and the Trust, however, the Government has refused to inform any of them of the specific individuals to whom the Government's claims relate and the amounts of those claims. Pls.' Mem. in Supp. of Mot. at 3; AHP's Mem. in Supp. of Joint Mot. with Pls.' as to Claims Asserted by the United States ("AHP's Mem. in Supp. of Joint Mot.") at 3-4. Instead, the Government has demanded that the parties provide it with the names, addresses, social security numbers and medical treatment history of class members so that the federal agencies can sweep these lists to determine the extent to which they have claims against those class members, if any. (Pls.' Mem. in Supp. of Mot. at 3.) The Government has also demanded information from the Trust that is not in the Trust's possession nor necessary to fulfill its duties under the Settlement Agreement, such as claimants' federal Health Care Identification Numbers ("HCINs"), and has suggested that the Trust is obligated to cooperate with the Government in gathering such information. (Tr. 3/13/01 at 39-41.) The Government has not agreed to identify any claims that might surface in accordance with any timetable even if this information is disclosed. (Pls.' Mem. in Supp. of Mot. at 3.) Furthermore, the Government stated that if the Trust distributes

Settlement proceeds to class members, as it is obligated to do under the Trust indenture, without first satisfying the Government's claims against the recoveries of class member distributees, it will seek double damages against the Trust and others responsible for the distribution, including individuals, under the MSP's penalty provisions.[5] Id.

The parties and the Trust assert that capitulation to the Government's demands will breach the Trust's obligations to distribute Settlement proceeds and maintain the confidentiality of class information, and will result in significant delays in processing matrix compensation benefits. Id. They argue that both of these breaches are so significant as to amount to a failure of consideration that threatens the legal viability of the Settlement. Id. Furthermore, they contend that the Government has no sound legal basis for its position, which violates both procedural and substantive due process. Id. Accordingly, the parties seek an Order directing the Trustees to execute their responsibilities under the Settlement Agreement to make prompt payments to Settlement beneficiaries.

[5] In its statement of interest, the Government indicates that it may also seek to recover certain funds from class members who have received Medicare payments and their attorneys. (United States' Statement of Interest at 4.)

Pursuant to 28 U.S.C. § 517[6] and apparently in response to the parties' joint motion, the Government filed a "statement of interest" in which it attempts to explain the Government's rights under federal law to recover amounts expended for the benefit of class members and "to report on the results of the cooperative efforts between the Trust and the Department of Justice to resolve the United States' claims." (United States' Statement of Interest at 1.) Furthermore, Pretrial Order No. 1766, entered March 1, 2001, notified any interested parties and the Government that a hearing would commence on March 13, 2001, concerning the instant motion. The Government did not appear at the hearing.[7]

Under the Settlement Agreement, AHP has committed to make payments to Fund B totaling as much as $2,500,000,000.00 to cover

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[6] That statute, entitled "Interests of the United States in pending suits," provides that:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 517.

[7] The court faxed a copy of that Order to the Government's attorney at the DOJ on March 2, 2001. Additionally, AHP notified the Government of the hearing through two letters, one delivered on March 1 and the other March 2. (Tr. 3/13/01 Exs. AHP-1 & AHP-2.) On March 12, 2001, the court received a phone call from the Government indicating that it would not be present at the hearing, but that it would rest on its previously filed statement of interest.

the potential range of matrix benefits and the associated costs of administering those benefits. (Pretrial Order No. 1415 at 62.) As of the date of this Order, the Trust has sent out 62 matrix claim tentative determination letters involving claims worth a gross amount of $28,066,133.00. Ten of these 62 tentative determinations have become final determinations resulting in actual payments worth $4,885,728.00. Also, the Trust is about to make payments totaling $1,724,908.00 with respect to three additional claims. The Trust advised the court that it is on the verge of sending out another 76 tentative determinations worth $27,682,626.00. Thus, payments covering matrix claims worth in excess of $50,000,000.00 are imminent. The Government's demand that these payments not be made for the reasons that it advances in its statement of interest is an extremely disturbing prospect.

II. LEGAL STANDARD

The instant motion confronts the court with a rather unique and troubling circumstance. On the one hand, because the Government is not a party to the present litigation, the court cannot now make a final and absolute determination of its rights. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) (stating that one is not bound by judgment in personam resulting from litigation in which he is not designated as party

and has not been made party by service of process); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (same). On the other hand, in order to resolve the current impasse in the administration of the nationwide Settlement over which this court has continuing jurisdiction, and in order to protect the interests of the class and the funds held in trust for it, the court must assess to some degree the legal viability of the Government's claims in the absence of a motion to dismiss or motion for summary judgment. With that in mind, the court concludes that the most appropriate course of action in this circumstance is to review the Government's claims as if they are being challenged in the context of a motion for preliminary injunctive relief.

Accordingly, to obtain the relief sought, the moving parties must show both: (1) that they are likely to experience irreparable harm without the relief sought; and (2) that they are reasonably likely to ultimately succeed on the merits. See Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000) (setting forth standard for preliminary injunctive relief). The court will also consider the likelihood of irreparable harm to the Government and whether equitable relief will serve the public interest. See id. (directing that court consider likelihood of harm to non-moving party and public interest).

The court stresses that it is not engaging in a final adjudication of the Government's rights. Rather, it is assessing the likelihood of success of those claims in order to ensure that

class members receive the benefits to which they are entitled under the Settlement without undue delay.

III. DISCUSSION

The parties request that the court issue a ruling that protects the threatened parties and the Trust against any subsequent claims by the Government, including double damages penalties, arising out of the commencement of distributions without having identified and resolved the Government's claims, including findings that: (1) the statutes relied on by the Government would at most give it a right to recover medical expenses incurred on behalf of a relatively narrow category of class members, namely those provided medical care by the DOD, VA or IHS; (2) the Government's threat to impose double penalties on the Trust and the parties would not be well founded as a matter of law; and (3) the Government would be permitted to make subrogation claims under Section VII.D. of the Settlement Agreement for services provided by the DOD, VA or IHS, provided that the Government complies with the reasonable and necessary procedures and deadlines applicable to all such claims, whether made by the Government or others. Additionally, the parties request the court to approve the creation of a set aside in Fund B to be used in the event that the Government eventually establishes claims against AHP or the Trust with regard to funds

required to be distributed to class members at present, or from time to time hereafter under the Settlement Agreement. The joint motion also requests the court to rule that the Trust should not violate both its contractual and corresponding fiduciary duty by devoting its resources to gathering the information requested by the Government. Lastly, the parties seek an Order that the Trust should not violate the confidentiality provisions of the Settlement Agreement by providing the Government with information about class members that is currently in the Trust's possession. The court will address each of these requests seriatim.

A. Disbursement of Settlement Proceeds

1. Irreparable Harm and the Public Interest

Requiring the Trust to withhold distribution of Settlement proceeds otherwise determined to be payable until the Government identifies its interest in such proceeds, without the Government's adherence to any reasonable timetable for doing so, threatens the viability of a nationwide settlement that seeks to adjudicate the claims of hundreds of thousands of persons who are or will be entitled to payment as a result of their ingestion of diet drugs.

First, the Trust is obligated to make prompt payment of claims pursuant to strict deadlines. In summary, the Settlement Agreement requires that the Trust make a preliminary

determination regarding a claim within forty-five days from the date that the claim is complete. (Settlement Agreement § VI.C.4.e.) Once such a determination is made, the claimant is given thirty days to contest the preliminary determination. Id. § VI.C.4.f. Soon after expiration of that thirty-day period, the Trust must make a final determination, from which the claimant may appeal to this court for de novo review. Id. § VI.C.4.g & h.

From its experience in MDL 1014 (the Orthopedic Bone Screw Litigation) and the evidence presented at the March 13, 2001 hearing, the court is well aware of the inordinate delay likely to attend the Government's unilateral declaration of an imprecise prospect of what may arise to the level of a potential interest in Settlement funds.

In the nationwide class action settlement in MDL 1014, in what has turned out to be a disappointing extension of cooperation by the settled parties and the claims administrator, the Government was given a complete list of class members from which to identify and quantify its claims. Years later, the Government's claims are still contributing to delay in the distribution of settlement proceeds. Specifically, on numerous occasions between April 1999 and the present the Government was provided with computer databases with information concerning registered class members. (Tr. 3/13/01 Ex. P-3.) It was not until December 2000, however, that the Government made its first

specific demand for payment to settle all of its Medicare related claims. Id. This delay resulted from the Government having taken eight months to extract data concerning beneficiaries from its National Database, four months to filter out non-bone screw and otherwise irrelevant expenditures, and additional time to more accurately estimate its claims. Id. The Government's claims in MDL 1014 remain unresolved.

In the instant diet drug litigation, the Government has not agreed to identify the claimants to which its interests relate in accordance with any timetable, a problem compounded by the Government's and Trust's inability to reach a confidentiality agreement concerning a complete list of class members for the purpose of identifying the federal beneficiaries among them. (Tr. 3/13/01 at 37-55 & Ex. P-4.) Pursuant to a letter agreement of confidentiality, the Trust did disclose information limited to 217 claimants for the DOJ to run against a database of Medicare recipients. Id. at 44-45 & Ex. P-4 at Ex. G. About three weeks later, the Government responded only with a determination that about 43 of those claimants had received Medicare benefits at some point in time. Id. at 45-46 & Ex. P-4 at 6-7. The Government has not given the Trust any indication as to the dollar value or even a reliable range of its "interest" related to those claimants, nor, and of crucial importance, has it submitted any information to indicate that the Medicare benefits

were related to ingestion of diet drugs. Id. at 52. Also, in discussions with the Trust's attorneys, the Government's attorneys indicated that under the Government's process it could take anywhere from four to eighteen months from the time information about class members is disclosed to get to the point where payments could be distributed by the Trust.[8] Id. at 51-52. The court concludes that on the record before it, the Government's unconditional demand that the Trust delay distribution until the Government has determined its interest in the Settlement proceeds cannot be honored. To do so would not only force the Trustees to breach their fiduciary obligations to the class, but would also result in a material breach of the terms of the Settlement Agreement that is the basis of this court's entry of judgment on August 28, 2000 and was followed by a change in position by thousands of litigants and class members thereafter.

Second, the failure to timely distribute Settlement benefits may prompt class members to seek recission of the Settlement Agreement or the choices some have made to be a party to

[8] According to the evidence presented at the evidentiary hearing, the Government has also asserted an interest in Settlement proceeds arising from medical benefits that may be provided to class members in the future. (Tr. 3/13/01 at 63-64 & Ex. P-4 at 10.) This theory would logically prevent the Trust from making payments to any federal beneficiary indefinitely.

Accelerated Implementation Option ("AIO")[9] agreements executed pursuant to the Settlement Agreement, or to challenge the continued certification of the Settlement class. Again, this court has entered final judgment with respect to the nationwide Settlement, and thousands of cases have been dismissed. If the Settlement Agreement was rescinded or the class decertified, much of the enormous amount of time, expense and effort expended by all parties involved in this MDL 1203 in an attempt to efficiently resolve the hundreds of thousands of diet drug claims will have been wasted.

Lastly, the public has a significant interest in efficient resolution of this mass tort litigation. Significant public funds have been expended by virtue of the court's administration of this litigation. Further delay in payment of Settlement proceeds will not only cast doubt on the viability of the judicial system for efficiently resolving mass tort litigation, but failure of the Settlement would result in redundant and wasteful litigation of hundreds of thousands of claims that would otherwise have been finally resolved by the Settlement.

The court finds that any further delay in the distribution

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[9] The AIO is a private contract between a class member and AHP that allows a class member to receive all of the benefits to which he or she would be entitled under the Settlement Agreement regardless of whether or not the Settlement receives final judicial approval. The start date for receiving benefits pursuant to the AIO was August 28, 2000, the date on which this court approved the Settlement. See Pretrial Order No. 1415 at 74 (describing AIO).

of Settlement proceeds will cause immediate and irreparable injury to the class, and that equitable relief is in the public interest.

2. Likelihood of Success on the Merits

a. The Medical Care Recovery Act

The MCRA, enacted in 1962, grants the government a right of recovery from a third-party tortfeasor for the reasonable value of medical services rendered to the tortfeasor's victims. Holbrook v. Anderson Corp., 996 F.2d 1339, 1340-41 (1st Cir. 1993); United States v. Phillip Morris, Inc., 116 F. Supp. 2d 131, 139 (D.D.C. 2000); In re Orthopedic Bone Screw Prod. Liab. Litig., 176 F.R.D. 158, 179 (E.D. Pa. 1997). It provides in relevant part:

> In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person . . .

42 U.S.C. § 2651.

Congress enacted the MCRA primarily in response to the 1947 decision of the United States Supreme Court in United States v. Standard Oil Co., 332 U.S. 301 (1947). See Phillip Morris, 116

F. Supp. 2d at 140 (noting that MCRA was belated response to Standard Oil holding); In re Dow Corning Corp., 250 B.R. 298, 324-25 (Bankr. E.D. Mich. 2000) (stating that "there is no question that Standard Oil was the primary impetus behind this Congressional action"). In Standard Oil, the Court held that, absent explicit statutory authority to the contrary, the Government had no right to recover from tortfeasors expenses that were incurred in treating military personnel under federal health care programs. Standard Oil, 332 U.S. at 314-316. The Court noted that to create a common law right of recovery in the "distinctively federal" relationship between Government and soldier would improperly interject the judiciary into the role of establishing federal fiscal and regulatory policies. Id. at 314.

The MCRA did more, however, than address healthcare costs related to military personnel.[10] It also applies to non-military, Government furnished direct healthcare programs, such as those provided through the VA and IHS, "where recovery difficulties and federal fiscal policy considerations are

[10] The court notes that the cause of action created in the MCRA differs from the claim asserted by the Government in Standard Oil. In Standard Oil, the government sought to establish a claim for "interference with the Government-soldier relationship," entitling it to recover the cost of medical care and the soldier's pay. Standard Oil, 332 U.S. at 303. An MCRA claim permits recovery under the tort law of the applicable state for the reasonable value of medical care. See Heusle v. National Mut. Ins. Co., 628 F.2d 833, 838 (3d Cir. 1980) (stating that recovery is limited to instances where there was tort liability on third-person for medical expenses).

essentially the same as those pertinent in Standard Oil." Dow Corning, 250 B.R. at 325.

In order to recover under the MCRA, the Government must establish three elements. First, it must identify the federal beneficiary to which its claim relates and the medical care provided to that beneficiary. Id. at 326. Second, it must demonstrate that it was authorized by law to provide the medical care in question and the reasonable value of such care. Id. Third, it must establish that a third-person's tortious conduct necessitated the medical care provided to the federal beneficiary. Id. Once the Government has demonstrated these elements, it is subrogated to the beneficiary's right to recover the costs of medical care under applicable state tort law. Id.

The Government appears to assert a right to recover under the MCRA for medical care paid for or provided to two categories of class members: (1) those who have received benefits under Medicare; and (2) current and former Government employees and their families who received healthcare services through a variety of other federal programs, including those administered by the VA, IHS and DOD. (United States' Statement of Interest at 2.)

(i). Recovery of Medicare or Federal Employees' Health Benefit Act ("FEHBA") Costs Under the MCRA

The court concludes that under recent caselaw, it is highly unlikely that the Government can recover for benefits provided to

class members pursuant to Medicare or the Federal Employees' Health Benefit Act ("FEHBA"), 5 U.S.C. §§ 8901-14, the statute that creates a comprehensive program of subsidized health care benefits for federal employees and retirees.[11]

In Phillip Morris, the United States District Court for the District of Columbia dismissed claims asserted by the Government under the MCRA against eleven tobacco-related entities. Phillip Morris, 116 F. Supp. 2d at 135. In doing so, the court engaged in a thorough analysis of the MCRA's then thirty-eight year existence, including its legislative history, the construction of the statute by the federal agencies charged with its interpretation, the body of long standing federal and state case law, and the statute's non-enforcement by the DOJ for the majority of its existence, and concluded that Congress did not intend the MCRA to be used as a mechanism to recover Medicare or FEHBA costs. Id. at 138-144. The court hereby adopts the reasoning of the court in Phillip Morris with regard to the scope of the Government's rights of recovery under the MCRA. The court concludes that to the extent that the Government asserts a right to recover Medicare or FEHBA costs under the MCRA, such an

[11] It is not clear whether the Government asserts a right to recover from the Trust for benefits provided to class members under FEHBA. See United States' Statement of Interest at 2 (stating generally that "[s]ome government employees, former government employees, and their families receive health care services through various federal programs").

assertion of these legally dubious interests does not justify the Trust's withholding of distribution of matrix benefits to all eligible class members, regardless of whether not they have received federal health care benefits.

(ii). The Government's Interest Arising from Benefits Provided to Class Members by the DOD, VA or IHS

Although the Government may have a cause of action against AHP under the MCRA for recovery of costs related to benefits provided by the DOD, VA or IHS, the court concludes that any such interest does not extend to funds held in Trust for class members pursuant to the Settlement Agreement.

The Government points out, and the court has never doubted, that the MCRA gives the Government an independent right of recovery against the tortfeasor. United States' Statement of Interest at 3; Orthopedic Bone Screw, 176 F.R.D. at 179; see Holbrook, 996 F.2d at 1341 (stating that "'all courts which have considered the question have agreed that the [MCRA] gives the United States an independent right of recovery against the tortfeasor'") (citing United States v. Housing Auth. Of Bremerton, 415 F.2d 239, 241-42 (9th Cir. 1969)). Thus, there is no question that the Government's right is not extinguished by the injured person's settlement and release with the

tortfeasor.[12] Holbrook, 996 F.2d at 1340 (citations omitted); Orthopedic Bone Screw, 176 F.R.D. at 179 (citing Holbrook). However, the Government also seems to imply that because the MCRA creates a cause of action that is independent in the sense that it cannot be extinguished by an agreement to which it is not a party,[13] then it follows that it can recover from funds of a

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[12] In general, the Government's claims will be subject to substantive state laws which negate the existence of a tort cause of action against the alleged tortfeasor. United States v. Trammel, 899 F.2d 1483, 1487-88 (6th Cir. 1990); Heusle, 628 F.2d at 838; United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 887 (5th Cir. 1967). However, there is authority for the proposition that the Government's right of recovery is not defeated by procedural restrictions that might bar recovery by an injured person. Heusle, 628 F.2d at 837; United States v. Moore, 469 F.2d 788, 790 (3d Cir. 1972); United States v. Haynes, 445 F.2d 907, 910 (5th Cir. 1971); Fort Benning, 387 F.2d at 887; see Holbrook, 996 F.2d at 1340 & n.3 (stating proposition and citing cases); but see Dow Corning, 250 B.R. at 334 n.17 (criticizing rationale of those cases and stating that had Congress intended to subject Government subrogation right to state substantive laws but not procedural defenses, one would expect MCRA to expressly state so).

It should be noted that Congress imposed a three year limitation period on tort claims brought by the Government, which has been held to apply to MCRA claims. 28 U.S.C. § 2415(b); United States v. Hunter, 645 F.Supp. 758, 759-60 (N.D.N.Y. 1986); Forrester v. United States, 308 F.Supp. 1157, 1158 (W.D. Pa. 1970); see also United States v. Gera, 409 F.2d 117, 120 (3d Cir. 1969)(stating that MCRA cause of action is limited only by three year limitation set forth in 28 U.S.C. § 2415(b)).

[13] The Government states that the MCRA provides it with "an independent right to recover, as well as a subrogation right." (United States' Statement of Interest at 2-3.) However, the better reading of the statute leads to the conclusion that the Government possesses a single independent cause of action that is also subrogatory in nature. See Trammel, 899 F.2d 1483, 1487-88 (MCRA only confers right to recover where beneficiary is injured by tortious conduct: Government stands in position

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settlement between the tortfeasor and the injured beneficiary of federal funds. This proposition has little, if any, support in the caselaw interpreting the MCRA.

By its terms, the MCRA only grants the Government a right to recover "from [the] third person who is liable in tort for the injury." Holbrook, 996 F.2d at 1340. It makes no provision for recovery against the injured party or from funds paid to the injured party by the tortfeasor. Id. The Government's rights under the statute do not allow it to collect from a settlement fund negotiated between the injured person and the settling defendant. Holbrook, 996 F.2d at 1340; Orthopedic Bone Screw, 176 F.R.D. at 179; see also Thomas v. Shelton, 740 F.2d 478, 482 (7th Cir. 1984) (stating that MCRA does not give government lien

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[13](...continued)
similar to subrogee to state law claim of beneficiary against tortfeasor); Heusle, 628 F.2d at 837 (noting that Government stands in position of subrogee to claim of injured party against tortfeasor); United States v. York, 398 F.2d 582, 584 (6th Cir. 1968) (stating that all courts that have applied MCRA have agreed that Government's right "is an independent right, subrogated only in the sense that the person sued by the Government must be liable to the injured person in tort") (citations omitted); Fort Benning, 387 F.2d at 887 (stating that Government stands in role of subrogee "only to the extent that its independent right to recover depends upon the determination under state law as to when the circumstances create tort liability in some third person"); Dow Corning, 250 B.R. at 331 (stating that "[t]he plain language of the statute, the established legal authority as well as common sense all belie the government's contention that it has two separate claims" under the MCRA). Basically, the Government's cause of action is independent in the sense that it cannot be affected by the actions of the federal beneficiary. Its subrogatory nature derives from the fact that it is premised upon the tort committed against the federal beneficiary.

against tortfeasor's or anybody else's property, but simply cause of action against tortfeasor). The Government cites no authority to the contrary. Thus, to the extent that the Government has a right to recover under the MCRA for the reasonable value of medical care provided to class members, that right, whenever it is identified, may lie against AHP, but not the class members or the Trust.[14] See Holbrook, 996 F.2d at 1341-42 (stating that there is no need for Government to look to injured party's settlement: Government still has right to sue independently and, if it can prove liability, to collect full medical expenses).

Assuming, arguendo, that the Government did have a potential right to recover funds paid by AHP to the Trust for the benefit of class members, the Government would still have to establish that AHP was a liable tortfeasor with respect to those class members under relevant state law. Id. (stating that Government's right to recover is contingent upon "circumstances creating tort liability on some third party")(quoting statute); see United States v. Farm Bureau Ins. Co., 527 F.2d 564, 565-66 (8th Cir. 1976) (noting that statute "authorizes the Government to

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[14] The court notes that tortfeasors and their liability insurers will often require injured plaintiffs to satisfy any liability of the tortfeasor or its insurer as a condition of settlement. In such a circumstance, the Government is an intended beneficiary of the settlement agreement, and the settling plaintiff's obligation is enforced under principles of contract law. Holbrook, 996 F.2d at 1341-42; Cockerham v. Garvin, 768 F.2d 784, 787 (6th Cir. 1985).

institute legal proceedings only against a person liable in tort"). Because AHP has not expressly or implicitly conceded liability in its settlement with the class, this is an unavoidable burden for the Government to carry and one as to which, as of this point in time, it has not disclosed even a hint of any real attempt to satisfy. See, e.g., Fed. R. Evid. 408 (providing that evidence of furnishing valuable consideration to settle disputed claim is not admissible to prove liability). Thus, any potential interest that the Government may have in funds set aside by AHP for class members is necessarily speculative at this point in time.[15]

The court finds that the parties and the Trust have demonstrated that they are likely to ultimately prevail on the merits of an MCRA claim brought against them by the Government related to the disbursement of proceeds from Fund B.

b. The Medicare Secondary Payer Act

The MSP consists of a series of amendments to Medicare that grant the Government a statutory right to recover certain

[15] Although not necessary to the court's decision to grant partial relief, the court notes that many of the Government's MCRA claims may be barred by the three year limitation period which begins to run from the date that the Government provides medical care. 28 U.S.C. § 2415(b); Hunter, 645 F.Supp. at 759-60; Forrester, 308 F.Supp. at 1158. The diet drugs at issue in this litigation were withdrawn from the market in September 1997, well over three years ago.

Medicare expenditures.[16] Rather than focusing on a tortfeasor, the statute essentially makes Medicare a "secondary" payer where another entity, a "primary payer" is required to pay under a "primary plan" for an individual's healthcare. 42 U.S.C. § 1395y(b)(2); Phillip Morris, 116 F. Supp. 2d at 145. The MSP defines a "primary plan" as "a group health plan or large group health plan, . . . a workman's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance . . ." under which payment for medical care "has been made or can reasonably be expected to be made promptly." 42 U.S.C. § 1395y(b)(2)(A). If the Government, as secondary payer, makes a payment for which a primary plan is responsible, the payment is conditioned on reimbursement from the primary payer. Id. § 1395y(b)(2)(B)(i). The MSP grants the Government a cause of action against the primary payer or any person who has received payment therefrom for reimbursement of those payments or double damages. Id. § 1395y(b)(2)(B)(ii).[17] Thus, like the MCRA, the MSP creates a

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[16] Congress created Medicare in 1965 to provide federally funded health insurance to the aged, the disabled, and persons suffering from end-stage renal disease. Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 414 (D.C. Cir. 1994).

[17] That section states in relevant part:

> In order to recover payment under this subchapter for such an item or service, the United States may bring an

(continued...)

direct cause of action in favor of the Government that is enforceable through judicial action. Health Ins. Ass'n, 23 F.3d at 425.

The Government clearly states that it is entitled to recovery for payments made to Medicare beneficiaries who are also members of the class. In doing so, the Government necessarily implies that some entity qualifying as a "primary payer" contributed funds to the Trust.

It appears that the Government asserts an interest in the Settlement proceeds because it believes that AHP qualifies as a self-insured plan that is subject to the MSP. The Government notes that under the Health Care Financing Administration's ("HCFA") regulations, a "'self-insured plan' . . . 'means a plan under which an individual, or a private or governmental entity, carries its own risk instead of taking out insurance with a

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[17](...continued)

> action against any entity which is required or responsible . . . to make payment with respect to such item or service . . . under a primary plan (and may . . . collect double damages against that entity), or against any other entity (including any physician or provider) that has received payment from that entity with respect to the item or service, and may join or intervene in any action related to the events that gave rise to the need for the item or service. . . .

42 U.S.C. § 1395y(b)(2)(B)(ii). The MSP further provides that the Government "shall be subrogated . . . to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan." Id. § 1395y(b)(2)(B)(iii).

carrier.'" See United States' Statement of Interest at 4 (quoting 42 C.F.R. § 411.50(b)). HCFA regulations define a "plan" as "any arrangement, oral or written, by one or more entities, to provide health benefits or medical care or assume legal liability for injury or illness." 42 C.F.R. § 411.21. From these provisions, the Government concludes that:

> Therefore, an entity that enters a liability insurance settlement, i.e., an arrangement in which an entity that has chosen to carry its own risk agrees to assume legal liability for injury or illness, is a self-insured plan under the statute.

(United States' Statement of Interest at 4.) The court doubts the Government's ability to prevail on this theory of MSP liability against AHP, the Trust or class members.

First, the HCFA itself, the entity charged with administering Medicare and that promulgated the regulations to which the Government cites, has indicated that "the mere absence of insurance purchased from a carrier does not necessarily constitute a 'plan' of self-insurance." 54 Fed. Reg. 41727 (Oct. 11, 1989) (responding to comment that regulations should clarify whether Medicare is primary payer when presumed tortfeasor has no liability insurance).

Second, there is no basis to conclude that Congress intended the MSP to create in the Government a right to recover from alleged tortfeasors for injuries resulting in Medicare payments. Unlike the MCRA, the MSP does not mention a right by the

Government to recover from a tortfeasor. Rather, the express wording of the statute creates a cause of action only against insurers and their payees. See United States v. Rhode Island Insurers' Insolvency Fund, 80 F.3d 616, 622 n.5 (1st Cir. 1996) (stating that MSP "limits reimbursement to recoveries from 'primary plans,' whose definition lists only entities which are clearly 'within' the insurance industry"); Phillip Morris, Inc., 116 F. Supp. 2d at 146 & n.22 (dismissing MSP claim against defendants who clearly were not insurance entities and noting that courts have uniformly recognized that statute's clear purpose was to grant Government right to recover Medicare costs from insurers) (citations omitted); Dow Corning, 250 B.R. at 337 n.22 (stating that unless alleged tortfeasor qualifies as primary plan or received payment from primary plan, MSP does not grant right to initiate direct action against it); see also Health Ins. Ass'n, 23 F.3d at 427 n.* (stating that MSP "plainly intends to allow recovery only from an insurer") (Henderson, J., concurring). Under the Government's construction of the statute, every tortfeasor that used its general assets to fund a tort settlement with persons who had received federal health care benefits would be potentially liable under the MSP. There is simply no support for this extremely broad construction of the statute. The court's conclusion is bolstered by the fact that up until the Phillip Morris and Dow Corning cases, the caselaw is

devoid of any instances in which the Government attempted to sue a tortfeasor under the MSP, despite the fact that the statute had been in existence for twenty years. Phillip Morris, 116 F. Supp. 2d at 146 n.22. As Judge Kessler noted, "it is clear that Congress did not intend MSP to be used as an across the board procedural vehicle for suing tortfeasors." Id. at 135.

Third, the plain meaning of the term "self-insured plan" and the statutory context in which that term is used indicate that it does not include tortfeasors that merely have the ability to and do in fact fund a settlement of a tort suit with general assets of the company. The statute's requirement of the existence of a primary "plan" connotes some type of formal arrangement by which an entity consciously undertakes to set aside funds to cover potential future liabilities and a formal procedure for processing claims made against that fund pursuant to the terms of the "plan." For example, a leading treatise on the subject of insurance states that:

> . . . to meet the conceptual definition of self-insurance, an entity would have to engage in the same sorts of underwriting procedures that insurance companies employ; estimating likely losses during the period, setting up a mechanism for creating sufficient reserves to meet those losses as they occur, and, usually, arranging for commercial insurance for losses in excess of some stated amount.
>
> In many states, the status of the self-insurer is . . . so formal that certificates are issued to some self-insurers, with detailed statutes specifying who is eligible to seek formal self-insurer status and specifying the exact procedure for attaining that status.

1 Couch on Insurance 10:1 (citing, as an example, IBM's historical self-insurance of employee health benefits); see also Dow Corning, 250 B.R. at 339 (stating that "[w]e are dubious that the term 'self-insured plan' covers or was meant to cover every tortfeasor who fails to obtain insurance") (citations omitted); Alderson v. Ins. Co. of N. Am., 223 Cal. App. 3d 397, 407 (1990) (noting that it is implicit in term "self-insurer" that such entity maintains reserve, to cover possible losses, from which it pays out valid claims and that self-insurer has procedure for considering such claims and managing reserve). The HCFA's definitions of a "self-insurer" and a "plan" are not to the contrary. 42 C.F.R. §§ 411.21 & 411.50(b). Thus, it is unlikely that the government can maintain a cause of action against AHP, the Trust or class members simply by virtue of the fact that AHP funded the Settlement with its own funds rather than those of a liability insurer. Furthermore, there is no evidence that AHP maintains such a formal plan of self-insurance in order to cover possible losses.

Given the authority interpreting the MSP and the plain language of the statute, the court agrees with AHP's assertion that the Government's MSP cause of action arises when the "primary plan" is obligated to pay for the primary care at issue under a contract of insurance, not when the payment obligation

arises out of tort litigation.[18] See AHP's Mem. in Supp. of Joint Mot. at 19-20 (arguing that double penalties might be appropriate against insurer who fails to honor contractual obligation to pay, but not against tortfeasor). To read the statute otherwise would lead to the conclusion that Congress authorized double damages against alleged tortfeasors merely for contesting liability. The court concludes that Congress could not have intended such a result when the full history of the topic is considered.

It is also possible that the Government asserts an interest in the Settlement proceeds because it is under a belief that some other form of insurance, such as a liability insurance policy, has contributed to Fund B.[19] Regardless of whether a products

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[18] The Government states that the decision in Phillip Morris does not contradict its apparent assertion that AHP is a self-insurer that qualifies as a primary payer under MSP because in that case Judge Kessler dismissed the MSP count as improperly pled. (United States' Statement of Interest at 4 n.1.) The Government is correct that Judge Kessler dismissed the MSP count because the government failed to allege that the tobacco related entities in that suit maintained any kind of plan or arrangement. Phillip Morris, 116 F. Supp. 2d at 146. Given the plain language of the MSP, its legislative history, the caselaw interpreting it and the absence of any reported decision in which the Government has prevailed under MSP against an entity that was clearly outside of the insurance industry, the Government may have refrained from making such assertions in the complaint out of fear that to do so would violate the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 11 (providing for sanctions against attorney that submits pleading containing claims or legal contentions not warranted by existing law.)

[19] The court does not read the Government's letter or its (continued...)

liability insurance policy qualifies as a primary plan under the statute, which the court doubts,[20] the evidence establishes that

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[19](...continued)
statement of interest as asserting a claim of this nature, however.

[20] In relevant part, § 1395y(b)(2)(A) of the MSP defines a "primary plan" as including a liability insurance policy "to the extent that" payment for health care "can reasonably be expected to be made promptly" under that policy. See 42 U.S.C. § 1395y(b)(2)(A) (stating that "primary plan" means "liability insurance policy . . . to the extent that" § 1395y(b)(2)(A)(ii), encompassing plans that can reasonably be expected to make prompt payment, applies). Thus, if a liability insurance policy has not paid and cannot reasonably be expected to pay for the health care at issue under the plan, it is not a "primary plan." See Dow Corning, 250 B.R. at 348 n.29 (citing Health Ins. Ass'n, 23 F.3d at 419).

Furthermore, a Medicare payment is only conditional, and the Government only becomes a "secondary payer," if that payment is for an item or service to which § 1395y(b)(2)(A) applies. Id. § 1395y(b)(2)(B)(i). Therefore, when Medicare pays for health care to which § 1395y(b)(2)(A) does not apply - for example, payment for an item or service that the Government cannot reasonably expect to be paid for promptly under the terms of a liability insurance policy - the Medicare payment is not conditional, the Government does not acquire secondary payer status with respect to that payment and the Government's "putative authority to initiate a recovery action under" § 1395y(b)(2)(B)(ii) does not arise. Dow Corning, 250 B.R. at 348 n.29.

For these reasons, the statement in Phillip Morris that "[i]f the 'primary' payer has an obligation to pay for such costs, but does not and cannot 'reasonably be expected' to do so, Medicare may make a 'conditional payment' and later demand reimbursement from the primary plan" is too broad. Phillip Morris, 116 F. Supp. 2d at 145. In this court's opinion, it is the obligation to make prompt payment "under" the plan that makes an entity a "primary" payer and the Government the "secondary" payer. The court notes that this issue was not germane to Judge Kessler's otherwise thorough and well-reasoned decision.

HCFA regulations state that a payment is made "promptly" if made within 120 days after the earlier of the date the care was provided or the date a claim is filed with the insurer. 42 C.F.R. §§ 411.21, 411.50. Given the time delay inherent in tort

(continued...)

there were no funds contributed to the Trust from such a policy. (Tr. 3/13/01 Ex. AHP-3.) Thus, as a factual matter, such a claim would not succeed on the merits.

For all of these reasons, the court concludes that the parties and the Trust have demonstrated that they are likely to ultimately prevail on the merits of any MSP claim brought against them by the Government.

3. Likelihood of Irreparable Harm to the Government

The court finds that compelling the Trust to commence distribution of proceeds is not likely to cause irreparable harm to the Government.

First, to the extent that the Government may have viable claims against AHP under the MCRA related to medical benefits provided by the DOD, VA or IHS, because such claims are independent and cannot be extinguished by a settlement between the tortfeasor and the injured victims, compelling the Trust to

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[20](...continued)
litigation, it is unlikely that the Government can establish that a products liability insurance policy is of the type that the Government can reasonably expect to make prompt payment for medical care. See, e.g., Evanston v. Hauck, 1 F.3d 540, 544 (7th Cir. 1993) (stating that tort judgment "can in no sense be considered the kind of certain, prompt third-party payment Congress had in mind when it wrote the Medicare statute"); Dow Corning, 250 B.R. at 348 n.29 (noting that it would seem folly for Government to argue that when it made Medicare payments on behalf of breast implant recipients, there was reasonable expectation that third-party would promptly pay for such care).

commence distribution of settlement proceeds will not prejudice the Government's legal right to sue AHP for the cost of benefits necessitated by AHP's allegedly tortious conduct.

Second, even if the Government can successfully assert claims to Settlement proceeds under the MCRA or MSP, there is no indication that either the Trust or AHP lack sufficient assets to satisfy such claims.

Third, the procedure for adjudication of subrogation claims established by the Settlement Agreement for all subrogees provides the Government with a fair and efficient manner of resolving any claims it might have by virtue of its provision of medical benefits to class members. The Government is free to utilize that process if it wishes to do so, and to take advantage of attendant reduced burdens of proof provided for in the Settlement Agreement.

Fourth, out of an exercise of extreme caution, the court will direct that the Trust create and maintain, out of Fund B, a reserve of $7,000,000.00. Samuel Kursh, D.B.A, a forensic economist, testified at the evidentiary hearing on the instant motion that based on his mathematical analysis of the Settlement matrices, the Medicare payments likely due to class members in connection with diet drug related injuries amounted to about $23,600,000.00 at most. (Tr. 3/13/01 at 33-34 & Exs. P-1, P-2.)

Dr. Kursh pointed out that maximum participation in class settlements is historically 40 percent. Id. at 35 & Ex. P-1. Assuming a participation rate of 40 percent, he concluded that the total value of the government's potential interest was unlikely to exceed $10,000,000.00. Id. at 35 & Ex. P-1. The court has previously been presented with evidence that the median historical participation rate in class action settlements is much lower, running at about 15 percent. See Tr. 8/10/00 at 106 (reflecting testimony of Harvey Rosen, Ph.D.). Based on this evidence, the court concludes that a $7,000,000.00 reserve will adequately protect any interest that the government may ultimately establish that it is entitled to in the Settlement proceeds.

In summary, the court concludes that the parties have demonstrated a sufficient and immediate threat of irreparable harm from further delay in the distribution of Settlement proceeds to eligible Settlement beneficiaries. Further, the parties have demonstrated that the Government's asserted interest in Settlement proceeds is not sufficiently identified at this time, and will not be in any predictable segment of the future, to warrant further delay in distribution of those funds to persons entitled to payment. Accordingly, the court will enter an Order (1) directing the Trust to commence distributions

forthwith; and (2) directing the Trust to create a reserve fund of $7,000,000.00. The reserve may be utilized, pursuant to court order, in the event that the Government ultimately establishes an interest in Settlement proceeds relating to class members to whom Fund B distributions were previously made without making deduction for the Government's subsequently established interest.

B. Disclosure of Information Concerning Class Members to the Government

The specific issue of the scope of the Trust's duty to disclose confidential class member information is not sufficiently ripe for adjudication by the court. Ripeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review. Whitman v. American Trucking Ass'n, Nos. 99-1257 & 99-1426, 2001 U.S. LEXIS 1952, at *37 (U.S. Feb. 27, 2001); N.E. Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 (3d Cir. 2001) (citation omitted); Artway v. Attorney Gen. of the State of New Jersey, 81 F.3d 1235, 1247 (3d Cir. 1996). An issue is not ripe for adjudication "if it rests on 'contingent future events that may not occur as anticipated or may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998). A party seeking declaratory judgment to protect against a future event must demonstrate that the probability of the future event occurring is real and substantial, "'of sufficient immediacy and reality to warrant the issuance of a

declaratory judgment.'" The Presbytery of the Orthodox Presbyterian Church of New Jersey v. Florio, et al., 40 F.3d 1454, 1466 (3d Cir. 1994) (citation omitted); see Mountbatten Surety Co., Inc. v. Brunswick Ins, Agency, Civ. No. 00-1255, 2000 U.S. Dist. LEXIS 10611, at *10 (E.D. Pa. July 27, 2000) (quoting same).

The Government is not present before the court and to the court's knowledge has not taken any legal steps to require disclosure of confidential class member information or sanction the Trustees or class members for failing to cooperate in compiling such information. The evidence presented at the evidentiary hearing indicates that efforts to reach an all encompassing confidentiality agreement have not been fruitful, but that nevertheless discussions concerning this issue have been ongoing.[21] Furthermore, the Government and the Trust were able to reach a confidentiality agreement concerning a limited number of class members. The parties have not demonstrated that there is a high degree of probability that the Government will take immediate action to their detriment or that they will otherwise

[21] The court notes the Government is likely in a better position than the Trust to determine who among the recipients of federal health care benefits received federal benefits related to valvular heart disease and when such benefits were provided. If the Government were to create a list of such persons, the court might consider authorizing the Trust to inform the Government of whether or not each of those persons was a Settlement beneficiary.

suffer harm if the court declines to address the issue at this time. Such events qualify as contingencies that may not occur as anticipated or at all. Accordingly, the joint motion will be denied without prejudice to the extent that it seeks a ruling from the court regarding the Government's right to confidential information concerning class members and the Trust's duty to provide such information. For the same reasons, the court need not address the parties' substantive due process arguments at this time.

C. Procedural Due Process

Similarly, because the Government has yet to take any legal steps to secure its asserted interest in Settlement proceeds, it would be premature at this time to address the argument that the Government's construction of the MCRA and MSP, along with its alleged unwillingness to commit to a reasonable timetable for resolution of its claims, violates procedural due process.

IV. CONCLUSION

For the reasons stated above, the joint motion to require the AHP Settlement Trust to distribute the proceeds of Settlement will be granted in part and denied in part. The court will enter an Order directing the Trust and those other persons and entities essential to the Trust's function (including Trustees, administrators, attorneys, support staff and others fulfilling

necessary tasks) to commence distribution of Settlement proceeds pursuant to the terms of the Settlement Agreement forthwith. All payments made by the Trustees out of Settlement proceeds pursuant to the court's Order and the terms of the Settlement Agreement are declared by the court to be the result of a reasonable and proper exercise of the duties of the Trustees and those other aforementioned persons and entities. The court will also direct the Trust to establish and maintain a reserve fund of $7,000,000.00. To the extent that the joint motion seeks additional declaratory or injunctive relief, it will be denied without prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE, FENFLURAMINE, DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO. 99-20593

PRETRIAL ORDER NO. _____

AND NOW, TO WIT, this day of March, 2001, upon consideration of the parties' joint motion to require the AHP Settlement Trust to distribute the proceeds of Settlement and the United States' (the "Government") Statement of Interest in response thereto, IT IS ORDERED that said motion is GRANTED IN PART and DENIED IN PART. IT IS FURTHER ORDERED that:

1. The AHP Settlement Trust (the "Trust") shall forthwith commence distribution of the proceeds of Settlement to eligible class members in accordance with the terms of the Settlement Agreement approved by the court in Pretrial Order No. 1415;

2. To the extent that they are in compliance with this Order and the terms of the Settlement Agreement, all payments made by the Trust (including the Trustees, administrators, attorneys, support staff and others

fulfilling necessary tasks) pursuant to this Order are declared by the court to be the result of a reasonable and proper exercise of the duties of the Trustees of the Trust and those other aforementioned persons and entities;

3. The Trust is directed to establish and maintain a separate account in the amount of $7,000,000.00. This reserve may be utilized, pursuant to court order, in the event that the Government ultimately establishes an interest in Settlement proceeds relating to class members to whom Fund B distributions were previously made without making deduction for the Government's subsequently established interest; and

4. To the extent that the joint motion seeks additional declaratory or injunctive relief, it is DENIED WITHOUT PREJUDICE.

SO ORDERED.

LOUIS C. BECHTLE, J.